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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

) WT DOCKET NO. 94-147

JAMES A. KAY, JR.

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To: Administrative Law Judge
Richard L. Sippel

WIRELESS TELECOMMUNICATIONS BUREAU'S
OPPOSITION TO APPLICATION FOR REVIEW

1. By Order, FCC 95I-06 (released February 3, 1995), the Commission referred to the Presiding Judge an Application for Review, filed on January 12, 1995, by James A. Kay, Jr. ("Kay"). The Wireless Telecommunications Bureau hereby opposes the relief requested.

2. The Commission referred Kay's pleading to the Presiding Judge because Kay is seeking review of the Erratum, 51344 (released December 23, 1994), which was issued under delegated authority to correct the Hearing Designation Order, FCC 94-315 (released December 13, 1994) ("HDO"), in this case. The Commission concluded that because Kay's pleading is governed by § 1.115(e)(3) of the Commission's Rules, it is not entitled to any consideration by the Commission absent certification by the Presiding Judge. Section 1.115(e)(3) of the Commission's Rules states:

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Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation . . . A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge with 5 days after the designation order is released.

3. Kay's request for relief is procedurally defective for a number of compelling reasons. First, Kay has not filed with the Presiding Judge a request to certify his Application for Review to the Commission. On this basis alone, Kay's Application for Review should be dismissed. Moreover, even if his Application for Review could somehow be construed to also constitute a request for certification, it is clear that Kay's pleading is irreparably late. The Erratum of which Kay seeks review was released on December 23, 1994. Thus, any request for certification of an application for review of the Erratum would have been due no later than January 3, 1995. Since Kay's Application for Review was filed on January 12, 1995, it is more than a week late and is, therefore, subject to summary dismissal.

4. Assuming, arguendo, that Kay's Application for Review were not subject to summary dismissal because of its procedural infirmities, it is clear that his request for relief lacks merit because Kay has not demonstrated that the matter to which he takes exception involves a controlling question of law as to which there is substantial ground for difference

of opinion or that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. Indeed, Kay's arguments -- that the Wireless Telecommunications Bureau is not properly a party in this proceeding and the Erratum was improvidently issued -- are frivolous.

5. The Erratum carried out the ministerial task of conforming the HDO to reflect the results of the Commission's new internal organization. That is, the Erratum changed the docket number from "PR" Docket No. 94-147 to "WT" Docket No. 94-147. It also substituted the Chief, "Wireless Telecommunications Bureau" for the Chief, "Private Radio Bureau" as the appropriate party bearing the burdens in this case. Furthermore, the Wireless Telecommunications Bureau has been authorized to carry out certain functions -- including regulation of Private Land Mobile Radio Services -- that were formerly carried out by the Private Radio Bureau. Thus, in all matters relevant to this proceeding, the Wireless Telecommunications Bureau is in fact the successor to the former Private Radio Bureau. Moreover, pursuant to § 1.21 of the Commission's Rules, the appropriate bureau chief is deemed a party to a proceeding without the necessity of being named a party in the hearing designation order. Thus, given its role in overseeing the regulation of Private Land Mobile Radio Services, the Wireless Telecommunications Bureau is, by operation of § 1.21, *automatically* a party to this proceeding.

6. Kay is also wrong to the extent that he argues that there was no delegated authority for the Deputy Chief, Wireless Telecommunications Bureau, to release the

Erratum. Kay concedes at page 3 of his Application for Review that the Private Radio Bureau had the delegated authority to make editorial corrections to Commission orders. As the successor to the Private Radio Bureau, the Wireless Telecommunications Bureau assumed the authority to make ministerial corrections in the HDO.

7. Similar arguments advanced by Kay regarding the Erratum and the Bureau's participation have previously been rejected by the Presiding Judge in Memorandum Opinion and Order, FCC 95M-24 (released January 30, 1995). The instant Application for Review requires the same disposition.

Respectfully submitted,
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February 6, 1995

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau certify that I have, on this 6th day of February 1995, sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Opposition to Application for Review" to:

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